

MELINDA HARDY (Admitted to DC Bar)
SARAH HANCUR (Admitted to DC Bar)
U.S. Securities and Exchange Commission
Office of the General Counsel
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Washington, DC 20549
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hardym@sec.gov
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Attorneys for Respondent

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JOHN DOE,

Movant,

v.

U.S. SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

Case No. 3:11-MC-80208-CRB (NJV)

**DECLARATION OF MELINDA HARDY IN
SUPPORT OF U.S. SECURITIES AND
EXCHANGE COMMISSION'S
OPPOSITION TO JOHN DOE'S MOTION
FOR DE NOVO DETERMINATION OF
DISPOSITIVE MATTER REFERRED TO
MAGISTRATE JUDGE**

The Honorable Charles R. Breyer

Date: November 18, 2011

Time: 10:00 a.m.

Place: Courtroom 6, 17th Floor

1 I, Melinda Hardy, declare as follows:

- 2 1. I am an Assistant General Counsel in the Office of the General Counsel, United States
3 Securities and Exchange Commission. I write this declaration in support of the SEC's
4 Opposition to John Doe's Motion for De Novo Determination of a Dispositive Matter
5 Referred to Magistrate Judge (Dkt. No. 24) filed on October 4, 2011. Unless otherwise stated,
6 I have personnel knowledge of the facts states herein.
- 7 2. Attached as Exhibit 1 is a true and correct copy of an "email string" containing
8 correspondence that occurred between October 5, 2011 and October 6, 2011. This "string"
9 includes:
 - 10 a. Email correspondence date-stamped October 5, 2011 at 2:30 p.m. between Kyle P.
11 DeJong and "Google-legal-support@google.com." Derek A. Newman,
12 "Jeff@KBInternetLaw.com," Sarah Hancur, and I were "carbon-copied" on this
13 correspondence.
 - 14 b. Email correspondence date-stamped October 5, 2011 at 4:51 p.m. between Keith
15 Scully, Kyle P. DeJong, and "Google-legal-support@google.com." Derek A.
16 Newman, "Jeff@KBInternetLaw.com," Sarah Hancur, and I were "carbon-copied" on
17 this correspondence.
 - 18 c. Email correspondence date-stamped October 6, 2011 at 9:37 a.m. between Kyle P.
19 DeJong, "Google-legal-support@google.com," Derek A. Newman,
20 "Jeff@KBInternetLaw.com, and Keith Scully. Sarah Hancur and I were "carbon-
21 copied" on this correspondence.
 - 22 d. Email correspondence date-stamped October 6, 2011 at 1:20 p.m. between Keith
23 Scully, Kyle P. DeJong, "Google-legal-support@google.com," Derek A. Newman,
24 and "Jeff@KBInternetLaw.com. Sarah Hancur and I were "carbon-copied" on this
25 correspondence.
- 26 3. Attached as Exhibit 2 is a true and correct copy of email correspondence date-stamped
27 October 7, 2011 at 12:12 p.m. between Keith Scully and "Google-legal-
28

1 support@google.com.” Kyle P. DeJong, Derek A. Newman, “Jeff@KBInternetLaw.com,”
2 Sarah Hancur, and I were “carbon-copied” on this correspondence.

3 4. Attached as Exhibit 3 is a true and correct copy of email correspondence date-stamped
4 October 11, 2011 at 8:34 p.m. between “Google-legal-support@google.com” and Keith
5 Scully. Kyle P. DeJong, Derek A. Newman, “Jeff@KBInternetLaw.com,” Sarah Hancur and
6 I were “carbon-copied” on this correspondence.

7 I declare under penalty of perjury under the laws of the United States of America and the District
8 of Columbia that the foregoing is true and correct.

9
10 Executed: October 14, 2011



11
12 Melinda Hardy

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Exhibit 1

Hardy, Melinda

From: Keith Scully [Keith@newmanlaw.com]
Sent: Thursday, October 06, 2011 1:20 PM
To: DeJong, Kyle P.; Google-legal-support@google.com; Derek A. Newman; Jeff@KBInternetLaw.com
Cc: Hancur, Sarah E.; Hardy, Melinda
Subject: RE: In re Jammin Java (C-7826): Subpoenas Issued to Google, Inc. (Google Ref Nos. 142563, 142629, 143806)

Dear Mr. DeJong and Google Legal,

Mr. DeJong is relying on the wrong rule. Mr. DeJong cites to Fed.R.Civ.P. 72(a), which addresses objections to nondispositive motions. But Fed.R.Civ.P. 72(b) addresses dispositive motions, and provides that the District Court must review the recommended disposition de novo if objections are filed.

We filed a miscellaneous action seeking, as the sole relief, an order quashing the S.E.C.'s subpoenas. Thus, although the magistrate's decision addresses discovery and is erroneously entitled "order" rather than "findings", the magistrate's decision is dispositive, and our objections will be filed under Fed. R.Civ.P. 72(b). The magistrate's order is not effective until 14 days from its issuance, or until the District Court decides any objections.

Thank you,

Keith Scully
Attorney at Law
Newman Du Wors
1201 Third Ave, Ste 1600
Seattle, Washington 98104
206.274.2826 - Direct Phone
206.446.5491 - Cell Phone
206.274.2801 - Fax
keith@newmanlaw.com
www.newmanlaw.com

Email privileged and confidential - please destroy if you are not the intended recipient

From: DeJong, Kyle P. [mailto:DeJongK@SEC.GOV]
Sent: Thursday, October 06, 2011 9:37 AM
To: Google-legal-support@google.com; Derek A. Newman; Jeff@KBInternetLaw.com; Keith Scully
Cc: Hancur, Sarah E.; Hardy, Melinda
Subject: RE: In re Jammin Java (C-7826): Subpoenas Issued to Google, Inc. (Google Ref Nos. 142563, 142629, 143806)

Google Legal Support and Messrs. Rosenfeld, Newman, and Scully:

While the Does certainly have the right to file objections pursuant to Federal Rule of Civil Procedure 72, Mr. Scully's suggestion that Magistrate Judge Vadas' order is simply an "initial determination" is contradicted by a wealth of case law. "A magistrate judge's decision should not be considered ineffective, advisory, or nonfinal simply because they may be reviewed by the district court. Decisions by a magistrate judge on nondispositive motions are intended to be effective unless overturned by the district judge, just as decisions of a district judge are intended to be effective unless overturned by a circuit court." *In re Toys R Us Delaware, Inc. FACTA Litigation*, 2010 WL 4942645, at *9 (C.D. Cal. Jul. 29, 2010) (citing *Kimbrell v. ADIA, S.A.*, 834 F. Supp. 1313, 1317 (D. Kan. 1993)); see also *Keithley v. Homestore.com, Inc.*,

2008 WL 4298203, at *1 (N.D. Cal. Sept. 18, 2008) (finding that order entered by magistrate judge must be complied with absent the imposition of a stay). As stated in the letter sent yesterday, the SEC expects Google to produce the information requested by the relevant subpoenas as soon as possible, but by no later than this Friday, October 7, 2011.

Regards,

KYLE P. DE JONG
U.S. SECURITIES & EXCHANGE COMMISSION
312-886-0897 (DIRECT)
312-353-7398 (FAX)
DEJONGK@SEC.GOV

From: Keith Scully [mailto:Keith@newmanlaw.com]
Sent: Wednesday, October 05, 2011 4:51 PM
To: DeJong, Kyle P.; Google-legal-support@google.com
Cc: Hancur, Sarah E.; Hardy, Melinda; Jeff@KBInternetLaw.com; Derek A. Newman
Subject: RE: In re Jammin Java (C-7826): Subpoenas Issued to Google, Inc. (Google Ref Nos. 142563, 142629, 143806)

Dear Google Legal Support and Mr. De Jong:

We represent the John Doe movants in Google, Inc.'s internal reference numbers 142563 and 14269. Mr. DeJong's request that documents be produced no later than October 7, 2011, is inappropriate. We moved to quash the S.E.C.'s subpoenas, and our motions were referred to a magistrate judge for an initial determination. That determination has been issued, and our clients have a right to have the matter reviewed by the District Court judge prior to release of the information. *See* Fed. R. Civ. P. 72. We have 14 days from October 4 to file objections to the magistrate's initial determination. *Id.* Accordingly, Google should not release any documents until October 18, 2011, or until the District Court issues its ruling if objections are filed. We will provide courtesy copies of any filed objections to Google Legal Support.

Additionally, I ask that Mr. DeJong and any other party include me as well as Mr. Newman in any future correspondence. We are both counsel of record, and Mr. Newman will be on vacation for the remainder of the week.

Sincerely,

Keith Scully
Attorney at Law
Newman Du Wors
1201 Third Ave, Ste 1600
Seattle, Washington 98104
206.274.2826 - Direct Phone
206.446.5491 - Cell Phone
206.274.2801 - Fax
keith@newmanlaw.com
www.newmanlaw.com

Email privileged and confidential - please destroy if you are not the intended recipient

From: DeJong, Kyle P. [mailto:[\]](mailto:)
Sent: Wednesday, October 05, 2011 02:30 PM
To: Google-legal-support@google.com <Google-legal-support@google.com>
Cc: Hancur, Sarah E. <>; Hardy, Melinda <HardyM@SEC.GOV>; Jeff@KBInternetLaw.com <Jeff@KBInternetLaw.com>; Derek A. Newman
Subject: In re Jammin Java (C-7826): Subpoenas Issued to Google, Inc. (Google Ref Nos. 142563, 142629, 143806)

To Whom It May Concern,

Please see the attached correspondence. Google should produce documents responsive to the above-referenced subpoenas as soon as possible, but by no later than Friday, October 7, 2011. Please do not hesitate to contact me with any questions or concerns.

Regards,

KYLE P. DE JONG
SENIOR ATTORNEY
U.S. SECURITIES & EXCHANGE COMMISSION
175 WEST JACKSON BLVD., SUITE 900
CHICAGO, ILLINOIS 60604
312-886-0897 (DIRECT)
312-353-7398 (FAX)
DEJONGK@SEC.GOV

Exhibit 2

Hardy, Melinda

From: Keith Scully [Keith@newmanlaw.com]
Sent: Friday, October 07, 2011 12:12 PM
To: Google-legal-support@google.com
Cc: DeJong, Kyle P.; Derek A. Newman; Jeff@KBInternetLaw.com; Hancur, Sarah E.; Hardy, Melinda
Subject: Motion for de novo determination in Google Reference numbers 142563 and 14269
Attachments: Motion - 80208.pdf; Motion - 80209.pdf

Dear Google Legal Support,

I write regarding Google Reference numbers 142563 and 14269. We filed a motion to quash the subpoenas issued by the SEC in this matter. The magistrate judge issued a ruling, and we have filed motions for de novo determination of the Magistrate's order. Those motions are attached. The motions are noted for November 18, 2011, and Google should not release documents until the District Court has ruled. Please advise us if you intend to release documents prior to the issuance of a ruling.

Regards,

Keith Scully
Attorney at Law
Newman Du Wors
1201 Third Ave, Ste 1600
Seattle, Washington 98104
206.274.2826 - Direct Phone
206.446.5491 - Cell Phone
206.274.2801 - Fax
keith@newmanlaw.com
www.newmanlaw.com

Email privileged and confidential - please destroy if you are not the intended recipient

Exhibit 3

Hardy, Melinda

From: Google Legal Support [google-legal-support@google.com]
Sent: Tuesday, October 11, 2011 8:34 PM
To: Keith Scully
Cc: DeJong, Kyle P.; Derek A. Newman; Jeff@KBInternetLaw.com; Hancur, Sarah E.; Hardy, Melinda
Subject: Re: Motion for de novo determination in Google Reference numbers 142563 and 14269

Hello Keith,

We will hold off on producing until further notice.

Sincerely,

Google Legal Support

Original Message Follows:

From: Keith Scully <Keith@newmanlaw.com>
Subject: Motion for de novo determination in Google Reference numbers
142563
and 14269
Date: Fri, 7 Oct 2011 16:11:46 +0000

> Dear Google Legal Support,
>
> I write regarding Google Reference numbers 142563 and 14269. We filed
> a
motion to quash the subpoenas issued by the SEC in this matter. The magistrate judge issued
a ruling, and we have filed motions for de novo determination of the Magistrate's order.
Those motions are attached. The motions are noted for November 18, 2011, and Google should
not release documents until the District Court has ruled. Please advise us if you intend to
release documents prior to the issuance of a ruling.

>
> Regards,
>
> Keith Scully
> Attorney at Law
> Newman Du Wors
> 1201 Third Ave, Ste 1600
> Seattle, Washington 98104
> 206.274.2826 - Direct Phone
> 206.446.5491 - Cell Phone
> 206.274.2801 - Fax
> [<mailto:keith@newmanlaw.com>](mailto:keith@newmanlaw.com)
> [<http://www.newmanlaw.com>](http://www.newmanlaw.com)
> Email privileged and confidential - please destroy if you are not the
intended recipient
>
>